Supreme Court, U.S.
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No. 95-1221

In The

Supreme Court of the United States

October Term, 1995

JOSEPH B. HYMAN,

Petitioner,

v.

VIRGINIA DEPARTMENT OF TAXATION,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

PETITIONER'S REPLY BRIEF

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QUESTIONS PRESENTED

1. Whether the nature of the common fund rule is discretionary to the extent that it is permissible for it to be ignored.

2. Whether the fund was under the control of the Court.

3. Whether Petitioner asserts a constitutional right.

ADDITIONAL STATEMENT OF THE CASE

As to the relative importance of the *Lewy* and *Harper* cases, it should be noted that neither the order of filing nor the number of parties represented has any bearing on the intellectual content and value to the retirees of the efforts of the late Joseph B. Hyman, deceased, on whose behalf this reply is filed.

In point of fact, Mr. Lewy filed in the United States District Court at Alexandria prior to either of the cases, but the Alexandria court dismissed upon Virginia's representation there was a prompt and efficient remedy in the Virginia courts. Lewy then re-filed in the State court on a date after Harper, and *Harper* became the lead case through the long and tortuous history of this litigation.

The Virginia officials were being overwhelmed with refund claims because of the huge number of retirees affected. This was the origin of the legislature's extending the statute of limitations until the conclusion of the various refund cases.

Petitioner Hyman and counsel in *Harper* were denied fees out-of-hand with no opinion when they presented such requests three different ways, as noted in the original Petition.

The action of the State court was simply a one-line refusal, and in the other two instances, one-line denials of the requested relief with no hearing, no argument and no explanation or opinion.

Hence the opposition seems to be presenting what it believes the court's rationale would have been if there had been a hearing; or, alternatively, a rationale which justifies the lack of granting a hearing by claiming no relief could or should have been granted.

REASONS FOR GRANTING CERTIORARI

1. The Common Fund Rule Is Applicable In The Instant Case.

As recently as 1988, the Virginia Court reaffirmed this common law principle in *du Pont v. Shackleford*, 235 Va. 588, 594, 369 S.E.2d 673 (1988). In that case, the Court succinctly outlined the basis for the "common fund" doctrine as follows:

> The essence of the common fund doctrine is that it would be unfair to permit one party to retain counsel, to file suit, to secure a benefit that all will share, yet to leave the full cost of the effort upon one party who initiated the suit while others who will share the proceeds make no contribution. If others are to sit idly by and reap the benefits of one litigant's labors, the idle parties should share in the cost of those labors. In short, the common fund doctrine is aimed at preventing "free rides."

Id. at 594-95.

The *Lewy* and *Harper* cases epitomize the attainment of a common benefit for a large number of nonlitigants; indeed, in light of the legislative action which permitted the 14,250 nonlitigating retirees effectively to join the *Lewy* and *Harper* suits by opting out of the Settlement Fund, this case is the paradigm example of the proper circumstances for application of the "common fund" doctrine.

The common fund doctrine has been frequently applied in the context of taxpayer suits similar to *Lewy* and *Harper* and fees have been awarded under the common fund doctrine in suits based on the *Davis* decision itself. For example, fees have been granted in *Davis* suits

in Alabama, Arkansas, Iowa, Louisiana, Kansas, Michigan, Mississippi, New Mexico, South Carolina and Utah. See *Rinehart v. Sizemore*, No. 89-704-M (Cir. Ct. of Montgomery Cty. Ala. January 29, 1993); *Pledger v. Bosnick*, 306 Ark. 45, 811 S.W.2d 286 (1991); *Hagge v. Iowa State Dep't. of Revenue and Finance*, No. LA 20859 (Linn Cty. Dist. Ct. April 7, 1994); *Barker v. State of Kansas*, No. 89-CV-666 (Shawnee Cty. Dist. Ct. August 25, 1994) (awards in Utah and Mississippi cited at 15); *Ponthier v. Tarver*, No. 3396 (Bd. of Tax Appeals, State of La. May 4 ,1992); *Bryde v. Michigan*, No. 89-12513-CM (Ct. Claims February 8, 1991); *Burns v. State of New Mexico*, No. SF 89-1314 (Santa Fe Cty. Dist. Ct. July 26, 1990); *Bass v. State of South Carolina*, No. 89-CP-26-1136 (Horry Cty. Ct. of Common Pleas March 11, 1994). In addition to those who opted out, there were 140,000 retirees who took the settlement and are being paid without interest over several years. It is difficult to believe that these people would ever have had a settlement offered at all if it had not been for the efforts of counsel in the *Lewy* and *Harper* cases.

The opposition claims that it was not "solely" counsel's efforts which brought about recovery, but one needs only to look at the history of this litigation to realize that Virginia did nothing that it was not compelled to do by this Court. As previously mentioned, the General Assembly's extension was to prevent a hopeless administrative burden that could not possibly have been handled.

2. The Fund Was Indeed Under The Control Of The Court

It is not necessary that the funds be paid into court or created by the court's action for the court to have control of the funds.

Court control in common fund cases is often "remote and indirect." J.P. Dawson, *Lawyers and Involuntary Clients: Attorneys' Fees From Funds*, 87 Harv. L.R. 1597, 1614 (1974) (cited with approval in *duPont v. Shackleford*, 235 Va. at 595). There is no requirement that "the suit must actually bring money into the court as a prerequisite to the court's power to order reimbursement of expenses." *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 392 (1970).

The key to court control of the common fund is not direct control over a fund but jurisdiction over the parties which possess or control a fund. As a result, the Virginia cases applying the common fund doctrine premise the assertion of control of the common fund on the court's jurisdiction over the parties and the claims, not on the court's direct custody of the fund at issue. In *duPont*, for example, the fund was in the control of the court because the court had jurisdiction over the parties and the claims. *duPont*, 235 Va. at 593. Even in common fund cases involving real property, direct control is asserted over the *parties* that own an interest in the property. Control over the property itself is asserted only *indirectly* through those parties. *Austin v. Dobbins*, 219 Va. 930, 252 S.E.2d 588 (1979). Similarly, in stockholder suits, the Court controlled the fund through its authority to order the defendant, which possessed the common fund, to pay a portion of the fund to plaintiff's counsel. *Starring v. Kemp*, 167 Va. 429, 437-38, 124 S.E. 174 (1936). The Court never asserted direct control over the fund.

3. Petitioner Urges A Constitutionally Protectable Claim

This Court has stated, it is "affirmatively settled . . . that a cause of action is a species of property

protected by the Fourteenth Amendment's Due Process Clause." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 at 428 (1982). In *Logan* the Court held that a party had a protected property interest in a claim of unlawful termination pursuant to the Illinois Fair Employment Practices Act. *Id.* The Court has also upheld a party's property interest in an unsecured claim against an estate for an unpaid bill, *Tulsa Professional Collection Svs. v. Pope*, 485 U.S. 478, 485 (1988), as well as in a claim against a trust fund fiduciary. *Mullane v. Central Hanover Bank*, 339 U.S. 306, 311 (1950). Petitioner's equitable cause of action based upon the common fund doctrine likewise gives rise to a protected property interest in the Settlement Fund.

CONCLUSION

For the foregoing reasons in addition to those in the original Petition, certiorari should be granted.

Respectfully submitted,

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